**American Medical Waste Systems, Inc. *and* Local 813, International Brotherhood of Teamsters, AFL–CIO.** Case 2–CA–28909

July 10, 1996

## DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

Upon a charge filed by the Union on November 20, 1995, the General Counsel of the National Labor Relations Board issued a complaint on March 27, 1996, against American Medical Waste Systems, Inc., the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Respondent failed to file an answer.

On May 13, 1996, the General Counsel filed a Motion for Summary Judgment in the instant case with the Board.[1] On May 16, 1996, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

### Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, by letter dated April 16, 1996, notified the Respondent that unless an answer were received by April 26, 1996, a Motion for Summary Judgment would be filed.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Partial Summary Judgment.

On the entire record, the Board makes the following

[1] On March 27, 1995, the Regional Director for Region 2 issued a compliance specification in Cases 2–CA–23099, 2–CA–23184, 2–CA–23944, 2–CA–24745, and 2–CA–23880. Subsequently, the Respondent filed an answer to the compliance specification. On April 1, 1996, the Regional Director issued an order consolidating these cases with the above-captioned case. However, following receipt of the General Counsel's motion, by order dated May 16, 1996, the Board severed the instant case from the compliance proceeding in Cases 2–CA–23099, 2–CA–23184, 2–CA–23944, 2–CA–24745, and 2–CA–23880.

## FINDINGS OF FACT

### I. JURISDICTION

At all material times, the Respondent, a New York corporation, with an office and place of business in the Bronx, New York, has been engaged in the transportation of infectious medical waste materials. Annually, the Respondent, in the course and conduct of its business operations, provides services valued in excess of $50,000 for enterprises within the State of New York, which enterprises are directly engaged in interstate commerce and meet the Board's standard for assertion of jurisdiction exclusive of indirect inflow or outflow. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time drivers, including switchers and sharps/recycle drivers, and helpers, mechanics, warehousemen, and waste handlers employed by the Respondent at its facility, but excluding all other employees and guards, professional employees and supervisors as defined in the Act.

On February 6, 1995, the Board issued a Certification of Representative certifying the Union as the exclusive collective-bargaining representative of the unit, and since that time the Union, by virtue of Section 9(a) of the Act, has been and is the exclusive collective-bargaining representative of the unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

About July 25 and November 13, 1995, the Union requested in writing that the Respondent continue to bargain collectively for an initial collective-bargaining agreement with it as the exclusive collective-bargaining representative of the unit, and since about July 25, 1995, the Respondent has failed and refused and continues to fail and refuse to do so.

On a date within 6 months of November 20, 1995, the Respondent laid off approximately 30 or more of its unit employees. About July 1995, and continuing thereafter, the Respondent partially closed its facility. About July 25, 1995, the Union requested in writing that the Respondent bargain with it over the effects of a partial closing of its facility. Since about July 25, 1995, and continuing to date, the Respondent has failed and refused to bargain over the effects of its par-

tial closing. These subjects relate to wages, hours, and other terms and conditions of employment of the unit employees and are mandatory subjects for the purposes of collective bargaining. The Respondent laid off the employees and partially closed the facility without prior notice to the Union and without having afforded it an opportunity to bargain with the Respondent with respect to the layoff or the effects of the layoff and partial closing.

## CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has failed and refused, and is failing and refusing, to bargain collectively and in good faith with the representative of its employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) of the Act by failing and refusing to continue bargaining with the Union for an initial collective-bargaining agreement as the exclusive collective-bargaining representative of the unit, we shall order it to do so. As the refusal to bargain began during the certification year, we shall extend the certification year to ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law. Because it is unclear when the Respondent initially refused to bargain, however, we will leave for compliance the determination of the amount of time the certification year will be extended. See generally *Van Dorn Plastic Machinery*, 300 NLRB 278 (1990), enfd. 939 F.2d 402 (6th Cir. 1991); and *Dominguez Valley Hospital*, 287 NLRB 149 (1987), enfd. 907 F.2d 905 (9th Cir. 1990).

In addition, having found that the Respondent has violated Section 8(a)(5) and (1) of the Act by laying off approximately 30 or more of its unit employees on a date within 6 months of November 20, 1995, without notice to, or bargaining with, the Union, we shall order the Respondent to offer them immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful conduct. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Furthermore, as a result of the Respondent's unlawful failure to bargain in good faith with the Union about the effects of its decision to partially close its facility, the terminated employees have been denied an opportunity to bargain through their collective-bargaining representative. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed.

Accordingly, we deem it necessary, in order to effectuate the purposes of the Act, to require the Respondent to bargain with the Union concerning the effects of the partial closing of its facility on its employees, and shall accompany our order with a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violations and to re-create in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so by ordering the Respondent to pay backpay to the terminated employees in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

Thus, the Respondent shall pay its terminated employees backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the partial closing of its facility on its employees; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 days of the date of this Decision and Order, or to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Union; (4) the Union's subsequent failure to bargain in good faith; but in no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which the Respondent partially terminated its operations, to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner; provided, however, that in no event shall this sum be less than the employees would earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Backpay shall be based on earnings which the terminated employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F. W. Woolworth Co.*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra.

In view of the fact that the Respondent's facility is currently partially closed, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of its terminated employees in order to inform them of the outcome of this proceeding, as well as to post the usual notice at its facility.

## ORDER

The National Labor Relations Board orders that the Respondent, American Medical Waste Systems, Inc., Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to bargain collectively for an initial collective-bargaining agreement with Local 813, International Brotherhood of Teamsters, AFL–CIO as the exclusive collective-bargaining representative of the unit:

> All full-time and regular part-time drivers, including switchers and sharps/recycle drivers, and helpers, mechanics, warehousemen, and waste handlers employed by the Respondent at its facility, but excluding all other employees and guards, professional employees and supervisors as defined in the Act.

(b) Unilaterally laying off unit employees.

(c) Failing or refusing to bargain over the effects on the unit employees of the layoff or its decision to partially close its facility.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union for an initial collective-bargaining agreement and with respect to the layoff and the effects on unit employees of the layoff and the decision to partially close its facility, reducing to writing any agreement reached as a result of such bargaining. The Union's certification year shall be extended for an additional period of time from commencement of bargaining, as set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order, offer the unit employees laid off on a date within 6 months of November 20, 1995, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(d) Pay limited backpay to the unit employees terminated as a result of the partial closure of the facility in the manner set forth in the remedy section of this decision.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in the Bronx, New York, copies of the attached notice marked ''Appendix.''[2] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 20, 1995.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to bargain collectively for an initial collective-bargaining agreement with Local 813, International Brotherhood of Teamsters, AFL–CIO as the exclusive collective-bargaining representative of the unit:

> All full-time and regular part-time drivers, including switchers and sharps/recycle drivers, and help-

ers, mechanics, warehousemen, and waste handlers employed by us at our facility, but excluding all other employees and guards, professional employees and supervisors as defined in the Act.

WE WILL NOT unilaterally lay off our unit employees.

WE WILL NOT fail or refuse to bargain over the effects on our unit employees of the layoff or our decision to partially close our facility.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union for an initial collective-bargaining agreement and with respect to the layoffs and the effects on our unit employees of the layoff and our decision to partially close the facility, reducing to writing any agreement reached as a result of such bargaining. The Union's certification year shall be extended for an additional period of time from commencement of bargaining pursuant to the Board's Order in this case.

WE WILL, within 14 days from the date of the Board's Order, offer our unit employees who were laid off on a date within 6 months of November 20, 1995, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL pay limited backpay to our unit employees terminated as a result of the partial closure of our facility.

AMERICAN MEDICAL WASTE SYSTEMS, INC.